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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	CC Docket No. 93-36
TARIFF FILING REQUIREMENTS FOR NONDOMINANT COMMON CARRIERS	

To: The Commission

JOINT COMMENTS IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

PacTel Paging
Arch Communications Group, Inc.
AACS Communications, Inc.
Centrapage, Inc.
Crowley Cellular Telecommunications, Inc.
Kelley's Tele-Communications
Nunn's Communications Services, Inc.
Radio Electronic Products Corporation

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SUMMARY

Joint Commenters applaud the Commission's prompt efforts to reduce in the near term the burdens imposed upon nondominant carriers by the decision of the U.S. Court of Appeals for the District of Columbia Circuit vacating the tariff forbearance rules of the Commission. However, while Commenters support the relaxation of tariff requirements as to nondominant carriers, the Commission is nevertheless urged not to accept reduced tariffing requirements as an acceptable alternative to the complete elimination of tariff obligations where there is no apparent public benefit achieved by continuing such obligations, or where there is no clear statutory authority to impose such tariffing requirements.

The Commenters support many of the Commission's initiatives which are designed to simplify and streamline the filing process. Specifically, the Commission is encouraged to implement the reduction in the 14-day notice period to one day, eliminate or reduce the type of information required to be placed in tariffs, permit incorporation of other filed tariff rates by reference, and allow carriers to include either a maximum rate or a range of rates in their tariffs.

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1934, as amended (the "Act").[1] The following is respectfully shown:

I. Introduction

1. The Commenters all hold, directly or indirectly,[2] licenses to provide radio paging, mobile telephone and/or cellular telephone services under Part 22 of the Commission's rules. The Commenters include: (a) large, medium and small market operators; (b) family-owned and publicly-traded companies; (c) national, regional and local operators; and (d) companies that provide both common carrier and private carrier land mobile services. As a result, the Commenters represent a broad cross-

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[1] The Commenters' support for the relaxation of tariff requirements should not be construed by the Commission as an admission that radio common carriers are, in fact, subject to the federal filing requirements of Section 203 of the Act. The Commenters generally support a pending Declaratory Ruling Request by PacTel Paging (filed March 24, 1993) which confirms that, in most instances, radio common carrier companies are exempt under Section 221(b) of the Act from having to file and maintain federal tariffs.

[2] In the case of Arch Communications Group, licenses are held by subsidiaries in the names of Arch Capitol District, Inc., Arch Connecticut Valley, Inc., Hudson Valley Mobile Telephone, Inc., Arch Michigan, Inc. and Arch Southeast Communications, Inc. In the case of Crowley Cellular Telecommunications, Inc., licenses are held in the names of the following affiliated companies: Binghamton CellTelCo, Crowley Cellular Telecommunications Binghamton, Inc., Crowley Cellular Telecommunications Huntsville, Inc. and MC Cellular Corporation, among others.

section of nondominant carriers with a substantial interest in this proceeding.[3/]

II. The Simplification of Tariff Requirements Should Not Deter the Commission From Eliminating Unnecessary Filing Obligations

2. The Commenters applaud the Commission's prompt issuance of the Notice in an effort to reduce in the near term the burdens imposed upon nondominant carriers by the decision of the United States Court of Appeals for the District of Columbia Circuit vacating the permissive detariffing (forbearance) rules as applied in the Commission's Fourth Report and Order and the Competitive Carrier proceeding.[4/] As is indicated in greater detail below, the Commenters support many of the Commission's specific initiatives which are designed to simplify and streamline the filing process. Nevertheless, the Commenters urge

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[3/] While the Commission is taking steps in the right direction in the Notice, Commenters take exception to the blanket classification of all nondominant carriers in establishing streamlined tariff filing procedures. It is evident that not all nondominant carriers operate in the same regulatory environment. For instance, some communications services have a mix of dominant and nondominant carriers, such as the wireline access markets. Others, such as paging, consist of carriers subject to the same regulatory requirements. Thus, it makes little sense to institute the same tariff filing requirements for all. At a minimum, the Commission should establish separate requirements for categories of nondominant carriers with comparable services. Thus, the comments provided hereunder address only those streamlined tariff filing procedures with regard to radio common carriers, and do not purport to cover filing requirements which are more appropriately directed to other classes of nondominant carriers.

[4/] See AT&T Co. v. FCC, 978 F.2d 727 (D.C. Cir. 1992).

the Commission not to accept reduced tariffing requirements as an acceptable alternative to the complete elimination of federal tariff obligations in those circumstances where no public interest benefit appears to be achieved by continuing the filing requirement,[5] and especially in those circumstances where tariffing is preserved to the states by the Communications Act.

3. Although the proposed rule changes will facilitate the preparation, filing and maintaining of federal tariffs for nondominant carriers, significant burdens will remain. As a general rule, radio common carriers have refrained from filing federal tariffs since 1965 when the Commission released an informative public notice indicating that it considered radio common carrier service "to be exchange service within the meaning of Section 221(b)" of the Act over which the Commission "does not have jurisdiction even though a portion of such service is interstate, wherever the service is subject to regulation by state or local authority".[6] Consequently, radio common carriers are unlikely to be sufficiently cognizant of the Commission's tariff requirements to be able to prepare and file a proper tariff without incurring the costs of the assistance of counsel. Further burdens will be imposed whenever a tariff supplement is required to cover new services not reflected in the original

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[5] The Notice cites the Commission's repeated findings that tariff regulation of nondominant carriers is unnecessary and, in fact, harmful to competition. Notice, paras. 2, 9, 28.

[6] Mobile Tariffs, 1 FCC 2d 830 (1965), as republished, 53 FCC 2d 579 (Com. Car. Bur. 1975).

filing.[7] In the case of radio common carrier services, advanced technologies are rapidly evolving[8] which means that having to continually amend tariffs to reflect new service offerings could prove to be quite burdensome. Furthermore, even if the Commission accords nondominant carriers flexibility to propose ranges of tariff charges or rate maximums, supplemental filings would still be required whenever market forces led the actual charges to move outside of the previously filed range. All of these foreseeable circumstances indicate that federal tariff obligations will remain significant notwithstanding the Commission's laudable efforts to simplify them.

4. The Commission has a number of avenues to pursue to eliminate unnecessary federal tariff requirements.[9] First, it can continue to seek review of the Court's decision which overturned the permissive detariffing policy.[10] Second, the

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[7] This would also be the case where terms other than price changes are at issue. For instance, the imposition of an activation fee where one currently does not exist would require supplemental tariff filings.

[8] The diversity of land mobile services that are in the process of being developed is well reflected in the various requests for pioneer's preferences that have been sought in the Commission's wideband and narrowband PCS proceedings. See GEN Docket No. 90-314 and ET Docket No. 92-100.

[9] Because tariffing may adversely affect or limit competition and hence injure the public interest (see Section III, below), the Commission must pursue some strategy to eliminate all tariffing requirements for competitive services--such as radio common carrier services--through whatever means the Commission has available.

[10] Commenters believe that the Commission was correct in the Competitive Carrier decisions, and therefore should be upheld on appeal.

Commission can initiate or support legislative efforts to codify the permissive detariffing of nondominant carriers in federal law, thereby eliminating the statutory basis of the Court's recent ruling. Finally, in the case of radio common carriers, the Commission can grant PacTel's "Request for Declaratory Ruling" which seeks to confirm that radio common carriers are largely exempt from federal tariff requirements by virtue of Section 221(b) of the Act.[11/]

5. In sum, the Commenters urge the Commission to continue to be vigilant in seeking to eliminate to the maximum extent possible, consistent with its statutory obligations, federal tariff filing requirements by domestic nondominant common carriers for those services in which tariffing must exist, as well as easing those requirements in the near term.

11/ The essence of PacTel's request is that radio common carrier services, even wide-area services which cross state lines, are "exchange services" within the meaning of Section 221(b) of the Act; that such services are "subject to regulation by a State Commission or by a local governmental authority" within the meaning of Section 221(b) of the Act whether or not particular states choose to exercise their regulatory authority; and, consequently, common carrier paging operators are exempted by Section 221(b) of the Act from having to file and maintain federal tariffs, notwithstanding the Court's decision overturning the FCC's "permissive detariffing" policy. The Declaratory Ruling would not extend to that limited group of radio common carrier services as to which the Commission has preempted state authority (e.g., nationwide paging). In re Exemption of Common Carrier Paging From Federal Tariff Requirements, *Request for Declaratory Ruling of PacTel Paging* (petition filed March 24, 1993).

III. The Tariff Notice Requirements Must Be Relaxed to Avoid Potentially Anticompetitive Results

6. The Commission proposes to reduce the notice period required before tariffs may take effect from the current 14-day period to not less than 1 day. This proposal is based upon a tentative Commission conclusion that a longer notice period will have, in the absence of permissive detariffing, an anticompetitive impact on nondominant carrier competition. Notice, para. 15.

7. In days long past, the level of competition in the radio common carrier services was, in some instances, dampened by frequency scarcity and restrictive state entry policies. Over time, these barriers to competition have fallen as the Commission has allocated more channels to both mobile and paging services, and as barriers to entry at the state level have fallen. At the present time, radio common carrier services are fiercely competitive with prices for both service and equipment having fallen dramatically in recent years. In many instances, competitors actively "bid" for large, multiple-unit accounts through written proposals or formal requests for quotations ("RFQs"). The ability of carriers to respond effectively in bid situations could be adversely affected if their ability to offer a particular price is subject to any prior notice. Consequently, the Commenters strongly support the Commission's proposal to

permit tariffs to take effect on not less than one day's notice.[12/]

8. The authorities cited by the Commission in paragraphs 16-18 of the Notice do in fact establish that the Commission has legal authority to adopt the proposed one-day notice period. Since the existing notice provisions are established by rule, and not by statute, the Commission has the authority to change them, and its proposal to do so is well reasoned.

IV. The Tariff Content Requirements of Section 203(a) of the Act Must Be Narrowly Construed

9. The Commission proposes to further reduce the tariff filing burdens on nondominant carriers by limiting the type of information required to appear in tariffs. Specifically, the Commission is proposing to require such carriers to include in their tariff only the information called for by Section 203(a) of the Act, namely: "schedules showing all charges for itself and its connecting carriers...and showing the classifications, practices, and regulations affecting such charges."[13/]

10. The proposal to limit tariff filings to the minimum statutory requirements is appropriate and fully justified

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12/ Commenters also suggest that it may be appropriate to have some types of rate changes effective upon filing or subject to post-effective notification to avoid premature price announcements by virtue of a carrier's tariff filing obligations.

13/ Notice, para. 21; Communications Act, Section 203(a).

under the circumstances at hand. However, merely repeating the language from the statute does not offer filing parties much guidance. In adopting the proposed change, the Commission should specifically indicate that it intends to narrowly construe the statutory language.

11. For example, radio common carrier tariffs have historically contained a wealth of information regarding the carrier's classifications, practices and regulations, many of which have no direct bearing upon the schedule of charges.[14/] Since the statutory language only requires classifications, practices, and regulations "affecting such charges," much of the previously filed information appears to fall well beyond the scope of the statutory requirement. Consequently, the Commission should specifically indicate that nondominant carriers are not required to list their various classifications, practices and regulations that do not have a direct bearing on customer charges.[15/]

12. The Commission is proposing also to allow nondominant carriers to state in their tariffs either a maximum rate or a range of rates. Notice, para. 22. The Commenters

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[14/] Examples of these non-rate related items include listing definitions, and reciting billing and collection procedures, minimum obligations of the carrrier and responsibilities of the subscriber.

[15/] In other words, only those items which relate to the actual charge levied against the customer should be tariffed. Otherwise, the Commission will have to provide clear and precise guidance on a whole host of possible classifications, such as service terms, activation fees, etc.

support this proposal, and believe that the Commission does indeed have the statutory authority to proceed in this manner.

13. As earlier noted, radio common carrier services are fiercely competitive. As a general rule, prices have been declining over time. In the absence of an ability to specify either a maximum rate or a range of rates, radio common carriers will be required to constantly amend their initial tariff filings in order to conform the filed rates with those dictated by ever-changing market conditions. The Commission has properly recognized that requiring such filings would be extremely burdensome, with no corresponding regulatory benefit.[16/]

14. The Notice offers either maximum rates or a range of rates as alternative rate reporting methods without indicating the Commission's authority to permit either method. Analysis indicates, however, that the Commission does indeed possess such authority. The obligation of carriers to file and maintain tariffs under Section 203 of the Act must be read in conjunction with the Commission's authority under Section 205 of the Act to

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16/ The Commenters do not necessarily accept the Commission's rationale that permitting a range of rates would lessen the potential for rate collusion by withholding from competitors the exact rate being charged at any given time. In the case of radio common carrier services, there are a variety of methods for carriers to obtain the rates of their competitors, including state Public Service Commission filings (if applicable), promotional literature and advertising, and simple telephone requests for rate quotes. In the Commenters view, however, the ready availability of rate information in fact supports a relaxation of any requirement that a precise schedule be filed and maintained at the federal level. Customers and carriers have alternate means to secure this relevant information.

prescribe just and reasonable charges. Basically, Section 205 empowers the Commission to impose a schedule of charges if it finds that any charge, classification, regulation or practice of any carrier is not just and reasonable. Specifically,

> The Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed...[17/]

Based on this statutory language, the authority of the Commission to impose a maximum and minimum rate is unarguable. This being the case, it must necessarily follow that a carrier can itself file maximum and minimum rates under Section 203(a) of the Act. It cannot have been the intention of the framers of the Act to permit the Commission to impose maximum and minimum charges which, if voluntarily adopted by the carrier, would be unlawful. This is particularly true if the Commission authorizes the filing of a range of rates by regulations promulgated in a notice and comment rulemaking proceeding.

15. It is a fundamental tenet of statutory construction that different provisions of the same Act should be construed to the extent possible to be consistent rather than in conflict with one another. (See Federal Power Commission v. Panhandle Pipeline, 337 U.S. 498, 69 S. Ct. 1251 (1949)). Here, any conclusion that the Commission lacks the authority under

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17/ Communications Act, Section 205(a) (emphasis added).

Section 203(a) of the Act to permit nondominant carriers to submit maximum and minimum rates conflicts with the enforcement authority accorded to the Commission under Section 205 of the Act, and should, therefore, be disfavored.[18/]

16. Notably, the Commission has in other contexts allowed carriers to specify pricing ranges. For example, Section 61.47(e) accords pricing flexibility to dominant carriers subject to price cap regulation by allowing an annual increase or decrease of 5% within a "pricing band" in each service category. Thus, the concept of according carriers the ability to establish a range of rates has already been incorporated into the rules and regulations governing tariff filings.

17. In addition to making the above-discussed proposals to simplify tariff requirements, the Commission has asked interested parties to recommend additional or alternative means by which it may lawfully reduce the tariff filing burdens for nondominant carriers. The Commenters have a specific suggestion in this regard. The new rules should explicitly indicate that the Commission will allow nondominant carriers to incorporate other filed tariff rates by reference whether or not

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18/ The Commission should not be troubled by the language of Section 203(c) of the Act which prohibits a carrier from collecting "a greater or less or different compensation" than its published rate. If a carrier publishes a range of rates, and the actual charge falls within the range, then the carrier has not collected a different compensation. Thus, this language does not necessarily imply that a range of rates is outside of the contemplation of Section 203 of the Act.

the nondominant carrier technically qualifies as "concurring carrier".

18. Allowing such incorporations by reference will remove unnecessary paperwork in several ways. For example, providers of mobile telephone service frequently resell long distance services. In some instances, these mobile carriers charge end users the equivalent of AT&T long distance rates for such services, even if the underlying interexchange facilities they utilize are not acquired from AT&T. Under these circumstances, the mobile operator may not be accepted by AT&T as a concurring carrier and thus cannot take advantage of the reduced filing burdens which apply to concurring carriers. Unless it can incorporate AT&T's published rates by reference, this nondominant filer would be required to submit and constantly update extensive long distance rate schedules corresponding to AT&T's published rates. This would be accomplished by constantly duplicating and refiling the rate sheets that were already on file with the Commission. This exercise would appear to serve no useful purpose, and would subject the carrier to unnecessary expense. It would substantially reduce paperwork if the mobile carrier in this instance could simply incorporate the AT&T tariff by reference.[19/]

19. The ability to incorporate a tariff by reference also is appropriate in light of the current restriction in the

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19/ The incorporation by reference should be able to extend to any and all subsequent changes in the incorporated tariff.

rules that "[l]imited or partial concurrences will not be permitted". FCC Rules, Section 61.131. A mobile carrier might be acquiring long distance services at a bulk rate from AT&T and reselling them at AT&T's retail rate in all but a few isolated instances. For example, if a mobile carrier who operates only in Louisiana is competing with another carrier operating in both Louisiana and Mississippi who offers toll free dialing between the two states, the single state operator may feel constrained by competitive market forces to offer his customers toll free dialing to Mississippi. Even if this is the only instance in which the single state operator charges other than the AT&T long

much simpler for the Commission to permit nondominant carriers to incorporate the provisions of any previously filed and effective tariff by reference.

21. Finally, the Commission should allow carriers to incorporate other documents, such as subscriber agreements, into their tariffs in lieu of reciting policies and regulations to ease the burden of those companies who merely file tariffs for a portion of their service.

V. Conclusion

The foregoing premises having been duly considered, the Commenting Parties respectfully request that the Commission proceed with the simplification of the tariff requirements for nondominant carriers in a manner consistent with these comments.

Respectfully submitted,

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March 29, 1993

CERTIFICATE OF SERVICE

I, Tana C. Maples, a secretary in the law firm of Bryan Cave, do hereby certify that I caused copies of the foregoing **JOINT COMMENTS IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING** to be hand-delivered to the following:

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DC01 46148.02